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6

7 **UNITED STATES DISTRICT COURT**  
8 **NORTHERN DISTRICT OF CALIFORNIA**  
9 **(OAKLAND DIVISION)**

10 Anne McCollum,

Case No. C 01-1738 CW

11 Plaintiff,

**PLAINTIFF'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT**

14 v.

DATE: April 19, 2002

15 XCare.net, Inc. and Does 1-5, inclusive,

TIME: 10:00 a.m.

16 Defendant

PLACE: Crtrm. 2

Hon. Claudia Wilken

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PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION  
TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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1     **I. INTRODUCTION**

2                 Despite defendant XCare.net, Inc.'s ("XCare") deliberate obfuscation of plaintiff  
3 Anne McCollum's ("McCollum") claims, this case is a simple one: In October 2000,  
4 XCare fired McCollum so that it could retain the benefit of her anticipated \$570,130  
5 commission. XCare's willful actions breached McCollum's compensation contract as  
6 well as the covenant of good faith and fair dealing attendant to that contract. In so  
7 doing, XCare violated the California Labor Code, California Business and Professions  
8 Code, and the public policy of the State of California.

9                 XCare hired McCollum in June 2000 as its Director of eHealth Solutions for the  
10 Western Region, a high level sales manager position. When the company recruited  
11 McCollum, it lured her with a promise of the company's commission plan, a plan that  
12 allowed her to earn unlimited commissions. This promise of "the sky's the limit" was a  
13 prominent selling point for McCollum to move to XCare.

14                 McCollum proved to be an extremely effective sales person and was responsible  
15 for coordinating the largest contract that the company had ever seen: the Foundation  
16 Health Services - XCare.net Technology Partnership Contract ("Technology Partnership  
17 Contract"). As the Technology Partnership Contract negotiations drew to a close in late  
18 September 2000, the company realized that it would have to make good on its  
19 commission promise – as set forth in the company's 2000 Sales Incentive  
20 Compensation Plan ("Comp Plan") – to the tune of \$570,130. XCare balked. The  
21 company saw a significant amount of bookable income going out the door to an  
22 employee and desperately sought for a way to prevent that from happening. When  
23 Foundation Health Services ("FHS") caused the contract signing to be delayed, XCare  
24 had its chance. XCare moved swiftly to terminate McCollum on the eve of the  
25 anticipated signing date.

26                 After attempting to informally resolve this conflict for several months, McCollum  
27 determined that she had no other choice but to file the present action to recover her  
28

1 commission and all other damages that she had suffered because of XCare's bad faith  
 2 scheme to cheat her out of the compensation she was promised, and earned.

3 **II. RESPONSE TO XCARE'S PURPORTEDLY UNDISPUTED FACTS**

4 1-5; 7-12; 15-16. Undisputed as set forth. Though, as explained in full below,  
 5 McCollum does dispute the completeness and further characterization of those facts as  
 6 set forth in XCare's motion.

7 6. Disputed in Part. Blodgett's statement regarding the alleged status of  
 8 contract negotiations between FHS and XCare (Blodgett Decl. ¶ 5) is inadmissible and  
 9 insufficient to establish this "fact." The truth of the "fact" is also disputed. Blodgett, a  
 10 "Human Resources Specialist", in his own declaration states that his personal  
 11 knowledge extends only to "issues related to personnel and the documentation  
 12 maintained by XCare relating to personnel, including salaries and commissions."  
 13 Blodgett Decl. ¶¶1-2. His declaration is devoid of any reference to how he attained  
 14 personal knowledge regarding the status of contract negotiations. Further, the record  
 15 shows that – while the two companies did have a prior business relationship – the idea  
 16 for the Technology Partnership Contract was not even voiced until after McCollum came  
 17 on board. Cangarlu Depo 38:1-40:14.<sup>1</sup>

18 13. Disputed in Part. McCollum did not resign. She did not sign the  
 19 unsolicited resignation and general release that was sent to her because it said she  
 20 resigned and because it called for her to release XCare from its obligation to pay her  
 21 commissions on the Technology Partnership Contract. McCollum Depo 227:2-20<sup>2</sup>;  
 22 McCollum Decl. ¶ 12 & Exh. F.

23 14. Disputed. XCare has "taken the position that she resigned effective  
 24

25  
 26 <sup>1</sup> Excerpts of the deposition of Afshin Cangarlu are attached as Exhibit C to the  
 Lebowitz Declaration, submitted herewith.

27  
 28 <sup>2</sup>Excerpts of the deposition of Anne McCollum are attached as Exhibit A to the  
 Lebowitz Declaration, submitted herewith.

1 10/11/00.” Lebowitz Decl. ¶ 8 & Exh. G. It is McCollum’s allegation that she was  
2 notified of her termination on October 10, but that she and XCare would work out a  
3 mutually agreeable, 30-day transition plan. McCollum Depo 110:10-111:24, 227:2-  
4 228:8.

**III. McCOLLUM'S ADDITIONAL MATERIAL FACTS IN DISPUTE**

6 McCollum, has a long stellar career in California's health care sales and  
7 marketing industry. See McCollum Decl. ¶ 2, Exh A. Before being recruited by XCare,  
8 she steadily worked her way up the ladder with various top California healthcare  
9 providers, including Kaiser Permanente and FHS. *Id.* While McCollum was staffing a  
10 booth at a Las Vegas trade show in the Spring of 2000, she was approached by Mark  
11 Rangell, a senior executive at XCare who then recruited McCollum to work at XCare.  
12 McCollum Depo 71:13-72:3, 78:23-80:16.

13 As it was described to her, XCare provided the health care industry with leading  
14 edge technologies to integrate back end systems (e.g., claims, eligibility, enrollment) in  
15 order to deploy these applications over the internet. McCollum Decl. ¶ 3. Accordingly,  
16 McCollum saw XCare as representing a logical next step in her career, injecting her  
17 firmly into the “new economy.” *Id.*

## 18 || A. McCollum's Employment with XCare

19 McCollum was employed by XCare from July 5, to October 11, 2000. *Def's Mem*  
20 *P&A* at 8:4. McCollum was paid an annual salary of \$85,000, plus benefits. Blodgett  
21 Decl., Exh. A. She also was entitled to a commission on all contracts signed on her  
22 accounts. *Id.* The rate of that commission was governed by the Comp Plan. *Id.* at Exh.  
23 B.

24 McCollum worked as a remote employee, out of her home office in Northern  
25 California.<sup>3</sup> As it was explained to her, McCollum was responsible for prospecting for

<sup>27</sup> <sup>3</sup>XCare's official headquarters is located in a suburb of Denver, Colorado, though the  
<sup>28</sup> company also maintains an office in Woodland Hills, California.

1 business to XCare and coordinating contract negotiations. McCollum Depo 124:10-  
 2 125:18. While she did not primarily engage in substantive negotiations over contract  
 3 terms, she was responsible for ensuring that the right people were talking to each other  
 4 – techies to techies, CEO's to CEO's, etc. McCollum Decl. ¶ 5; McCollum Depo 171:2-  
 5 14; Cangarlu Depo 22:3-23:2, 84:14-22, 93:2-10. In so doing she coordinated the  
 6 contract negotiations, or, in XCare-speak, she “drove” the contract. Pianko Depo  
 7 177:25-178:9.<sup>4</sup> Ultimately, McCollum was responsible for making sure the contracts,  
 8 both interim and long-term, got signed. McCollum Depo 172:8-22.

9 McCollum reported directly to Laurie Heilmann, the XCare Director of Sales.  
 10 McCollum also had contact with Heilmann's direct supervisor, Tom Pianko, the  
 11 Executive Vice President of Sales and Marketing. McCollum Decl. ¶ 4.

12 McCollum was assigned to the company's “Western Region” which  
 13 encompassed the western United States. McCollum Depo 124:10-18. At the time she  
 14 started with XCare, the company had only one existing account in that region – FHS. It  
 15 was her responsibility to continue the work with FHS as well as bring in new accounts.  
 16 McCollum Depo 125:19-126:6.

### 17           **1.       The Technology Partnership Contract**

18 One of XCare's primary reasons for hiring McCollum was her prior professional  
 19 relationship with FHS. McCollum Depo 99:21-100:21. When McCollum began working  
 20 at XCare, the company was just about to consummate a small services contract with  
 21 one of FHS' New Ventures Group divisions known as LAPS. McCollum Depo 140:16-  
 22 142:4; Cangarlu Depo 15:18-18:9, 36:19-23.

23 As soon as McCollum came onto the account, however, FHS' New Ventures  
 24 Group President Gary Velasquez first articulated his vision for the two companies to  
 25 engage in a long-term comprehensive business relationship. Cangarlu Depo 38:1-  
 26

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27           <sup>4</sup>Excerpts of the deposition of Tom Pianko are attached as Exhibit B to the Lebowitz  
 28 Declaration, submitted herewith.

1 40:14. After this so-called envisioning session, McCollum immediately crafted what  
2 would become the Technology Partnership Contract. Cangarlu Depo 40:20-42:7;  
3 McCollum Decl. ¶ 6. Following Velasquez' vision, that contract would extend over a two  
4 year period and be worth in the neighborhood of \$10 million in revenue to XCare.  
5 McCollum Decl. ¶ 6.

The Technology Partnership Contract was a complex undertaking. As XCare's West Coast General Manager, Afshin Cangarlu testified, "It wasn't as easy as we thought it was going to be." Cangarlu Depo 34:21-22; see also *id.* at 14:3-15:17. Attempting to unite the myriad divisions of FHS' New Ventures Group under one technology umbrella contract was a herculean task. It was not simply a negotiation between two companies. The corporate structure of FHS required that XCare negotiate deals with each of the New Ventures Group divisions and their respective leaders, not just Velasquez. Cangarlu Depo 32:16-33:6; McCollum Depo 148:23-150:16. Indeed, Velasquez, himself, proved to be an unpredictable, somewhat temperamental business partner. Cangarlu Depo 33:7-34:22; see also McCollum Decl. ¶ 10 & Exh. D. In addition to this multi-headed structure, FHS brought its own internal political in-fighting into the equation. Cangarlu Depo 32:16-33:6. From the XCare side, this contract was the first major undertaking for the company by both McCollum and Cangarlu.<sup>5</sup> Cangarlu Depo 34:23-35:5. All of these factors, mixed together with in-house counsel and outside auditors – each making revisions and demands upon the contract language – came together to form a unwieldy process full of redundancy and role confusion. *Id.* 42:8-19; McCollum Depo 114:12-20.

23 For instance, McCollum spent the first weeks of her employment selling and  
24 finalizing Statement of Works (“SOW”) from each of the New Ventures Group divisions.  
25 In essence, these SOW’s were short-term contracts that allowed the partnership to

<sup>5</sup>Cangarlu was the primary “technical” contact at XCare for this negotiation, while McCollum was the primary “big picture” sales contact. McCollum Decl. ¶ 5.

1 begin developing while the final contract negotiations were ongoing. Cangarlu Depo  
 2 35:6-36:10. These SOW's were drafted – as was customary – by Laura Deer of  
 3 XCare's Business Development and Sales department. McCollum Decl. ¶ 7.  
 4 Unfortunately, after McCollum successfully got all of the necessary SOW's signed, the  
 5 XCare auditors said they were insufficiently drafted to book the revenue for the third  
 6 quarter. McCollum Depo 153:10-154:5. So, McCollum had to wait for newly drafted  
 7 SOW's, and then get the New Ventures Group division heads to sign them again. *Id.*  
 8 200:5-201:1; McCollum Decl. ¶ 7 & Exh. B. At the same time, McCollum was  
 9 responsible for making sure the overall technology partnership contract was on track.  
 10 McCollum Decl. ¶ 7; see also Cangarlu Depo 43:14-44:2

11 In the face of these constantly evolving obstacles, McCollum worked tirelessly on  
 12 the Technology Partnership Contract. With all the various players involved in the deal, it  
 13 took up almost the entirety of each working day to make sure that the it was on track.  
 14 McCollum Decl. ¶ 8. She often worked 12 hour days and weekends to meet the  
 15 demands of this contract. *Id.* At the same time, XCare was telling her that the company  
 16 desperately needed the contract signed and the revenue booked. McCollum Depo  
 17 199:15-200:4.

18 McCollum did an admirable job. Indeed, throughout the project, McCollum  
 19 received praise and encouragement from Heilmann and Pianko. McCollum Decl. ¶ 9 &  
 20 Exh C. Not once did she receive any negative feedback as to her performance.  
 21 McCollum Depo 158:4-9; Pianko Depo 171:21-23.

22 Near the end of August, XCare realized that there was a real risk that the  
 23 Technology Partnership Contract would not be signed by the end of the fiscal quarter,  
 24 so the company prepared an interim contract that would allow XCare to realize revenue  
 25 while continuing the negotiation. Pianko Depo 167:1-169:17; Cangarlu Depo 46:5-21;  
 26 Lebowitz Decl. ¶ 10 & Exh. I.

27 By the end of September, it looked like the contract was finally ready to be  
 28

1 signed. In fact, September 22 was set to be the “signing day.” McCollum Depo 206:15-  
 2 210:22; McCollum Decl. ¶ 10 & Exh. D. However, at the last minute Velasquez  
 3 demanded several substantive changes to the deal. *Id.*; see also Cangarlu Depo 59:17-  
 4 20. So, the signing date had to be postponed until these final glitches could be worked  
 5 out. McCollum Depo 207:8-20; Pianko Depo 173:16-174:3; Cangarlu Depo 45:12-  
 6 47:22.

7 **2. McCollum’s Commission on the Technology Partnership  
 8 Contract.**

9 McCollum’s compensation at XCare was governed, in part, by the Comp Plan.  
 10 *Def’s Mem P&A* at 6:21-25. When XCare recruited McCollum, it promised her that  
 11 there was no limit to her commissions. McCollum Decl ¶ 3; see also Blodgett Decl. Exh.  
 12 B (no provision that placed caps or limits on commissions). That plan, a standard form,  
 13 was written exclusively by Pianko and XCare senior management. Pianko Depo.  
 14 140:23-141:23. McCollum was not given any opportunity to negotiate the terms of the  
 15 plan. *Id.*; see also McCollum Decl. ¶ 3.

16 As the Technology Partnership Contract stood at the end of September, it was a  
 17 two-year deal that would have resulted in a commission payout of \$570,130. Harrison  
 18 Decl. ¶ 2.

19 **3. XCare’s Rush to Terminate McCollum Before the Technology  
 20 Partnership Contract Signing**

21 Realizing that it was going to have to pay McCollum commissions of \$558,782 on  
 22 the Technology Partnership Contract, XCare moved to make sure it retained the benefit  
 23 of that income.

24 On Friday, October 6, Pianko announced to senior management, that McCollum  
 25 would be terminated for “cost cutting” reasons. Lebowitz Decl. ¶ 6 & Exh. E. Pianko  
 26 insisted that such termination take place no later than Wednesday, October 11. *Id.* In  
 27 XCare’s mind it was imperative that McCollum be terminated by October 11 because  
 28 Pianko was “shooting for a Thursday [October 12] signature” on the Technology

1 Partnership Contract. *Id.* at Exh. K.

2           **4. XCare's Ever-Shifting Explanation for Terminating McCollum**

3           As state above, on Friday October 6, XCare labeled McCollum's termination as  
 4 one for "cost cutting" reasons. Lebowitz Decl. ¶ 6 & Exh. E. In the first of many  
 5 different stories, on Monday, October 9, Pianko shifted his position and declared  
 6 McCollum's termination to be a result of her performance. *Id.* at ¶ 7 & Exh. F. This shift  
 7 in position was prompted by XCare's CEO, Lorine Sweeney. *Id.*

8           On Tuesday, October 10, Heilmann informed McCollum of her termination.  
 9 McCollum Decl. ¶ 11 & Exh. E. Heilmann claimed that XCare had received complaints  
 10 from employees of both XCare and FHS about McCollum's performance, though she  
 11 did not give any specifics as to those alleged complaints. *Id.* As it turns out, that  
 12 statement was a fabrication, one that XCare has repeated throughout this litigation.  
 13 Compare Lebowitz Decl. ¶ 11, Exh. J (XCare response to Interrogatory No. 10,  
 14 asserting that the company received complaints about McCollum from Velasquez), with  
 15 Pianko Depo 23:4-9, 182:7-11 (insisting that Velasquez never voiced any complaints  
 16 about McCollum). Nobody from FHS ever told XCare that they thought McCollum was a  
 17 poor performer or that she should be removed from the FHS account. Compare Pianko  
 18 Depo 27:23-29:20 (testifying that Dutt insisted that McCollum be removed from the FHS  
 19 account), with Dutt Depo 16:19-19:14 (denying ever making such a request, or having  
 20 the power to make such a request).<sup>6</sup>

21           The next day McCollum learned from Pianko that he had never heard any  
 22 complaints about her performance. McCollum Depo 117:7-118:5. He attributed the  
 23 problem to a "personality conflict" between McCollum and Heilmann. *Id.*

24           McCollum had never received any sort of performance review or performance  
 25 counseling while at XCare. McCollum Depo 158:4-9; Pianko Depo 171:21-23. Her

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27           <sup>6</sup>Excerpts of the deposition of Amitaubh Dutt are attached as Exhibit B to the  
 28 Lebowitz Declaration, submitted herewith.

1 termination came as a complete shock. McCollum Depo 130:13-17 ("[Y]ou could have  
 2 knocked me over with a feather on October 10. That's how shocked I was. I had no  
 3 premonition or inclination."), 223:24-223:13, see also McCollum Decl. ¶ 11 & Exh. D  
 4 (telling Heilmann and Pianko, she hopes to "understand what has actually transpired  
 5 here."). As XCare's Director of Human Resources stated, "performance issues should  
 6 be documented by the manager and the employee should be made aware of those  
 7 issues all along, not just upon termination." Lebowitz Decl. ¶ 8 & Exh. G.

8           **5. XCare's Attempt to Classify the Termination as a  
 9 Resignation**

10           XCare clearly intended this action to be a termination. See Lebowitz Decl. Exh.  
 11 E (Pianko stating: "The following individuals are going to be *let go* . . .") (emphasis  
 12 added), Exh. F (Sweeney responding: "We need to discuss whether these are lay-offs  
 13 of performance related *terminations*.") (emphasis added). Even though Pianko and  
 14 XCare's senior management determined that they would terminate McCollum's  
 15 employment, they subsequently declared themselves to be "*taking the position* that she  
 16 resigned effective 10/11/00." *Id.* at ¶ 8 & Exh. G (emphasis added).

17           Heilmann gave McCollum the "choice" of going on a performance plan – whereby  
 18 she would be off the FHS account – or accepting termination and a 30-day transition  
 19 plan in which McCollum would be phased out her work for the company, but still be  
 20 eligible for commissions on contracts signed in that period. McCollum Depo 110:10-  
 21 111:24, 227:2-228:8. McCollum opted for the transition plan, knowing that the hundreds  
 22 of hours that she had put into the Technology Partnership Contract were about to be  
 23 rewarded – as per her terms and conditions of employment – with the impending  
 24 signing of the contract. *Id.*

25           **B. The Signing of the Technology Partnership Contract**

26           The October 12 signing date never materialized. However, on October 20, 2000  
 27 (*i.e.*, only one week after officially terminating McCollum), XCare and FHS executed the  
 28

1 final contract. Lebowitz Decl. ¶ 9 & Exh. H. The final contract was only for one year,  
 2 though FHS retained a unilateral option to extend the contract by one additional year.  
 3 *Id.* at § 10.1, p. 6.

4       Upon hearing this news, McCollum wrote to XCare and requested 30-days salary  
 5 and commission for her work on the Technology Partnership Contract. McCollum Decl.  
 6 ¶ 12 & Exh. F. XCare never even bothered to respond to McCollum's request. *Id.*

7           **C. XCare's Partial Payment of Commission on the FHS Deals**

8       In the second week of October, XCare paid McCollum for the commissions she  
 9 had earned on the interim contract, which was signed on September 29. McCollum  
 10 Decl. ¶ 12; Pianko Depo 178:10-179:1; *see also* Lebowitz Decl. ¶ 10 & Exh. I. Those  
 11 commissions were calculated in accordance with the payment schedule attached to the  
 12 Comp Plan. Pianko Depo 180:13-181:2; *see also* Blodgett Decl. Exh. B.

13           **IV. XCARE HAS FAILED TO CARRY ITS BURDEN ON SUMMARY JUDGMENT**

14       The Supreme Court has articulated an exacting standard for granting defense-  
 15 initiated summary judgment. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530  
 16 U.S. 133, 149-54 (2000). In *Reeves*, the unanimous Court summarized the combined  
 17 teaching of the 1986 summary judgment trilogy as follows:

- 18           1. The court must review the record, "taken as a whole";
- 19           2. The court must draw all inferences in favor of the nonmoving party;
- 20           3. The court may not make credibility determinations;
- 21           4. The court may not weigh evidence;
- 22           5. The court must disregard all evidence favorable to the moving party that  
                 the jury is not required to believe;
- 23           6. The court should give credence to the evidence favoring the nonmovant;
- 24           7. The court should give credence to the evidence that supports the moving  
                 party "that is uncontradicted and unimpeached, at least to the extent that  
                 the evidence comes from disinterested witnesses."

*Id.* at 150-51 (citations omitted). In the end, the court must ask whether a reasonable jury *might* find in favor of the plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) If so, then summary judgment must be denied.

Moreover, as the moving party, XCare “bears the initial responsibility of informing the district court of the basis of that motion.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323. This burden is not met by a mere assertion. 11 *Moore’s Fed. Prac.*, § 56.13[1] (Matthew Bender 3rd ed.)

8 || V. ARGUMENT

**A. XCare Deliberately Misreads McCollum’s Complaint in a Transparent Attempt to Limit the Scope of Her Claims**

Throughout its motion, XCare deliberately misconstrues McCollum’s complaint. Specifically, XCare attempts to limit her complaint to the following contention: If XCare had honored its promise of a 30-day mutually agreeable transition plan, McCollum would have earned the commission on the Technology Partnership Contract. See *Def.’s Mem.* at 11:20-22, 12:11-15, 14:7-8, 14:19-20, 16:26-17:1. However, McCollum’s complaint reveals that her contentions – while encompassing the above allegations – are much more far-reaching. See *Complaint* at ¶¶ 36, 42, 54, 59, 60, 63, 64. McCollum’s complaint plainly alleges that XCare wrongfully, and in bad faith, removed her from the FHS account and terminated her employment with the company. It is McCollum’s contention that, but for this wrongful termination, she would have been working at XCare for an indeterminate period of time, not just for the next 30-days. Thus, XCare’s continued recitation of what it perceives to be “McCollum’s version of events” is entirely misleading and ignores a major component of her complaint.

When XCare's intentional misconstruction of events is removed, its motion is unveiled as a misguided attempt to shoehorn McCollum's complaint into a space that it does not reside.

1           **B. The 2000 Comp Plan's Ambiguous Language and Unconscionable**  
 2           **Terms, and XCare's Past Performance, Raise Triable Issues as to**  
 3           **McCollum's Breach of Contract Claim**

4           The Comp Plan is a classic adhesion contract. It is a standard form drafted  
 5           solely by Pianko and XCare management. Pianko Depo 140:23-141:23. McCollum had  
 6           no opportunity to negotiate over any of the terms of the contract. *Id.*; see also  
 7           McCollum Decl. ¶ 3. Accordingly, the doctrine of *contra proferentum* dictates that all  
 8           ambiguities in that contract must be construed against XCare, and in favor of McCollum.  
 9           This doctrine holds special importance on summary judgment, where all inferences are  
 10          to be construed in McCollum's favor in her effort to identify triable issues as to her  
 11          breach of contract claim. *Reeves*, 530 U.S. at 150-51.

12           **1. The Comp Plan's Ambiguous Language**

13           Despite XCare's self-serving assertion that the Comp Plan is "unambiguous", key  
 14          clauses of that contract remain vague and open to interpretation. To begin, the most  
 15          important clause of the contract for this litigation is poorly constructed and raises  
 16          questions as to XCare's application of that clause to McCollum. Specifically, XCare  
 17          relies on Section 1.5 of the Comp Plan as the basis for withholding her commission on  
 18          the Technology Partnership Contract. That section provides:

19           If *an employee terminates employment* at XCare.net at any time prior to  
 20          actual payment of a commission, unearned or otherwise deferred  
 21          commission payments that have not been disbursed to Plan provisions will  
 22          be forfeited.

23           Blodgett Decl. Exh. B (emphasis added). On its face, this clause only applies to  
 24          situations where "an employee terminates employment" – i.e., where the employee is  
 25          the actor and takes affirmative steps to resign. There is no language in the Comp Plan  
 26          that addresses the situation where the *employer* terminates the employee's  
 27          employment. Accordingly, the Comp Plan does not address the present situation.  
 28          Thus, there is no provision permitting XCare to withhold the commissions from the  
 Technology Partnership Contract. Absent such a provision, the Court must construe the

1 contract to ensure equity and guard against unjust enrichment. Those considerations  
 2 dictate that, at minimum, McCollum be compensated for the time and effort she  
 3 bestowed upon XCare to its financial benefit. Such considerations further demonstrate  
 4 that the record raises a triable issue as to McCollum's breach of contract claim.

5 **2. The Forfeiture Clause is Unconscionable**

6 One area where the Comp Plan is unambiguous is its use of the term "forfeit" in  
 7 reference to earned commissions. See Blodgett Decl. Exh. B at § 1.5, 4.5; see also  
 8 *Def.'s Mem P&A* at 9:17, 10:10. As used here, this term is unconscionable.

9 Under California law, a contract term is unenforceable if it is found to be  
 10 unconscionable. Cal. Civil Code § 1670.5(a). As one California Court of Appeal  
 11 summarized and explained:

12 "[U]conscionability has generally been recognized to include an absence of  
 13 meaningful choice on the part of one of the parties together with contract  
 14 terms which are unreasonably favorable to the other party.' [Citation]" (*A&M*  
*Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473, 486 [186 Cal.Rptr.  
 15 114, 38 A.L.R.4th 1].) In *A & M Produce*, this court recognized that  
 16 unconscionability has both a "procedural" and a "substantive" aspect. (*Ibid.*)  
 17 "The procedural element focuses on two factors: 'oppression' and 'surprise.'  
 18 [Citations.] 'Oppression' arises from an inequity of bargaining power which  
 19 results in no real negotiation and an 'absence of meaningful choice.'  
 20 [Citations.] 'Surprise' involves the extent to which the supposedly agreed-upon  
 21 terms of the bargain are hidden in a prolix printed form drafted by the  
 22 party seeking to enforce the disputed terms.' [Citations.]" (*Ibid.*)

23 "Substantive" unconscionability, on the other hand, "refers to an overly harsh  
 24 allocation of risks or costs which is not justified by the circumstances under  
 25 which the contract was made. [Citation.]" (*Carboni v. Arrospide*, (1991) 2  
 26 Cal.App.4th 76, 83 [2 Cal.Rptr.2d 845].) "[B]oth procedural and substantive  
 27 unconscionability must be present before a contract or clause will be held  
 28 unenforceable. However, there is a sliding scale relationship between the  
 two concepts: the greater the degree of substantive unconscionability, the  
 less the degree of procedural unconscionability that is required to annul the  
 contract or clause. [Citations.]" (*Ibid.*)

29 *Ellis v. McKinnon Broadcasting Co.*, 18 Cal.App.4th 1796, 1804-05 (1993).

1       The facts of this case are strikingly similar to the *Ellis* case. As in *Ellis*, McCollum  
 2 did not take time to read the Comp Plan when it was sent to her, she was told that it  
 3 was a standard plan. 18 Cal.App.4th at 1804; McCollum Decl. ¶ 3. Also, McCollum had  
 4 no opportunity to negotiate any of the terms of the contract. 18 Cal.App.4th at 1804;  
 5 McCollum Decl. ¶ 3. These facts also rise to the level of “oppression” based on  
 6 unequal bargaining power that the *Ellis* court found sufficient to meet the procedural  
 7 unconscionability prong. 18 Cal.App.4th at 1805. Further, the *Ellis* court found  
 8 substantive unconscionability in the fact that the forfeiture was the result of the  
 9 company’s actions, not upon any failure of the employee to perform his job. 18  
 10 Cal.App.4th at 1806-07. The *Ellis* court also found compelling the fact that the company  
 11 was the sole beneficiary of the forfeiture provision, allowing it to retain nearly \$20,000.  
 12 *Id.* at 1807. Obviously, this case is far more compelling considering the hundreds of  
 13 thousands of dollars at stake.

14       In its reply, XCare may attempt to rely on the case of *American Software, Inc. v.*  
 15 *Ali*, 46 Cal.App.4th 1386 (1996) to argue that the forfeiture provisions are not  
 16 unconscionable. However, that case is easily distinguishable on key facts. The *Ali*  
 17 court found that there was no procedural unconscionability because the plaintiff had an  
 18 attorney review the commission contract before she signed it, and she successfully  
 19 negotiated out substantial terms of the original contract. *Id.* at 1389, 1391-92. No such  
 20 facts exist here. Indeed, this case presents the exact opposite situation. McCollum had  
 21 no opportunity to negotiate any terms of the contract. Pianko Depo 140:23-141:23;  
 22 McCollum Decl. ¶ 3. Rather, it was a take-it-or-leave-it situation that is a classic  
 23 indication of procedural unconscionability. See *id* at 1392.

24       Also, the *Ali* court’s finding of no substantive unconscionability was based on  
 25 several key factors that are opposite to the facts of this case. For example, the *Ali* sales  
 26 contracts were ongoing, service contracts that required installment payments before  
 27 commissions were paid out to the salesperson. *Id.* at 1393. Here, all commissions are  
 28

1       earned when the contract is signed, there is no servicing provision. Also, the *Ali*  
 2       commission contract contemplated equivalent risks to the parties that do not exist here.  
 3       In that case, the company paid the plaintiff a nonrefundable draw that was counted  
 4       against her commissions. *Id.* If, at the end of the employment relationship, the plaintiff  
 5       had not earned sufficient commissions to offset her draw, then the employer would not  
 6       have any right to a refund. *Id.* In other words, there was *an equal risk of forfeiture*.  
 7       The Comp Plan has no such provision; McCollum forfeits everything while XCare  
 8       forfeits nothing. XCare gains the entirety of the commission earned by McCollum.

9           Considering all of the above, this Court should follow the reasoning of *Ellis* to  
 10      hold that McCollum has raised a triable issue as to unconscionability of the forfeiture  
 11      provision of the Comp Plan.

### 12           **3.       XCare's Past Performance Raises Triable Issues**

13       XCare's past performance shows that it did not enforce the terms of the contract  
 14      upon which it now relies. Specifically, XCare places great weight upon the terms of the  
 15      contract that provide that the company does not pay any commissions until the end of  
 16      the first month after the fiscal quarter in which the contract is signed. *Def.'s Mem. P&A*  
 17      at 11:14-12:4 However, in this case, XCare paid McCollum commissions for the interim  
 18      contract in the second week of October. McCollum Decl. ¶ 12; *Def.'s Mem P&A* at 5:5.  
 19      If XCare actually stood by the terms of the Comp Plan, then they would not have paid  
 20      McCollum anything, as she would not have been employed (in their view) by the end of  
 21      the month when payments were due. She would have forfeited those commissions.  
 22      Thus, XCare's own conduct demonstrates that it does not even consistently comply with  
 23      the terms of the Comp Plan. Accordingly, it cannot now hide behind these terms for its  
 24      own benefit.

25      ///

### 26           **C.       The Timing of McCollum's Termination and XCare's Actions Leading 27           to that Termination Raise Triable Issues as to McCollum's Claim that 28           XCare Terminated Her so as to Retain the \$558,782 Commission It**

1                   **was About to Owe Her**

2                   **1. The Covenant Applies to XCare's Exercise of Discretion**

3                   XCare simply misses the point of McCollum's claim for breach of the covenant of  
 4 good faith and fair dealing. In its motion, XCare confuses precedents dealing with  
 5 implying an exception to at-will employment with the law implying good faith into a  
 6 written contract that allows for one party to exercise discretion. To be clear, McCollum  
 7 is *not* arguing that her employment could only be terminated for cause. Indeed, such an  
 8 argument in this situation has been foreclosed by the California Supreme Court. *Guz v.*  
 9 *Bechtel Nat'l. Inc.*, 24 Cal.4th 317, 348-53 (2000).<sup>7</sup> What McCollum *is* arguing is that  
 10 XCare breached its obligation to act in good faith so as not to frustrate her ability to reap  
 11 the specific benefit provided for under the relevant written contract: the Comp Plan.  
 12 See *id.* at 353 n. 18 (recognizing a valid covenant claim would exist where, as here, an  
 13 at-will employee is terminated "as a mere pretext to cheat the worker out of another  
 14 contract benefit. . ."); see also Complaint ¶¶ 39-42.

15                   XCare seems to believe that the discretion it granted to itself under the Comp  
 16 Plan permits it to act in any manner it wishes. See *Def.'s Mem.* at 14:10-11. California  
 17 law unequivocally provides that XCare's belief is mistaken. Every contract, including a  
 18 contract that covers employee compensation, contains an implied-in-law covenant of  
 19 good faith and fair dealing. *Foley v. Interactive Data Corp.*, 47 Cal.3d 654, 683-84  
 20 (1988); *Locke v. Warner Bros., Inc.*, 57 Cal.App.4th 354, 363 (1997) (citations omitted).  
 21 Importantly, that covenant also applies to contracts that vest one party with discretion.  
 22 *Locke*, 57 Cal.App.4th at 363. As the California courts have held,

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24                   <sup>7</sup>Accordingly, XCare's cited authority is all misplaced. Each of those cases  
 25 addressed a plaintiff arguing that the covenant should act to override a written at-will  
 26 provision in a contract. See e.g., *Starzynski v. Capital Public Radio, Inc.*, 88 Cal.App.4th  
 27 33, 37-39 (2001) (holding that covenant cannot override specific written provision  
 28 describing manner in which modifications to at-will status must be made); *Halvorsen v.*  
*Aramark Uniform Svcs.*, 65 Cal.App.4th 1383, 1387-90 (1998) (refusing to allow covenant  
 to override express at-will provision in written contract).

1        “[W]here a contract confers one party with discretionary power affecting the  
 2        rights of the other, a *duty is imposed to exercise that discretion in good faith*  
 3        *and in accordance with fair dealing.*”

4        *Id.* (quoting *Perdue v. Crocker Nat'l Bank*, 38 Cal.3d 915, 923 (1985)) (emphasis  
 5        added).<sup>8</sup> That covenant is a promise by each party to not “frustrate the other from  
 6        enjoying benefits under the agreement to which the other is entitled.” *Kuhn v.*  
 7        *Department of Gen'l Svcs.*, 22 Cal.App.4th 1627, 1637-38 (1994) (citations omitted);  
 8        see also *Kelecheva v. Multivision Cable T.V. Corp.*, 18 Cal.App.4th 521, 531-32 (1993).  
 9        Under California law, “what [the implied covenant of good faith and fair dealing]  
 10      embraces is dependent upon the nature of the bargain struck between [the parties] and  
 11      the legitimate expectations of the parties which arise from the contract.” *Commercial*  
 12      *Union Assurance Cos. v. Safeway Stores, Inc.*, 26 Cal.3d 912, 918 (1980). In gleaning  
 13      the “legitimate expectations of the parties”, California law requires that “[t]he whole of a  
 14      contract is to be taken together, so as to give effect to every part, . . . each clause  
 15      helping to interpret the other.” Cal. Civ. Code § 1641.

16        XCare spends considerable effort in declaring that the Comp Plan grants it  
 17      unfettered discretion and that McCollum is attempting to add terms to the contract. In  
 18      so doing, XCare relies upon certain provisions of the Comp Plan. However, XCare  
 19      omits some key provisions from that discussion; provisions that, as required by  
 20      California law, must be read together with the terms of the contract to determine the  
 21      scope of the parties intent. Cal. Civ. Code § 1641. In particular, XCare fails to mention  
 22      either section 1.1 or 1.2.

23        Section 1.1 of the Comp Plan declares the following:

24        The XCare.net Sales Incentive Compensation Plan has been developed for

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25        <sup>8</sup>Thus, XCare’s reliance on *Nager v. Allstate Ins. Co.*, 83 Cal.App.4th 284 (2000) is  
 26      unfounded. In that case, the court found that the defendant had acted reasonably and  
 27      within the confines of its discretion under the contract. 83 Cal.App.4th at 291-93. Thus,  
 28      *Nager* simply affirms McCollum’s stance that discretionary power must be exercised in  
 29      good faith.

1           the purpose of increasing company sales productivity, revenue and  
 2           profitability. The plan accomplishes these objectives by providing financial  
 3           incentives for Plan Participants to meet and exceed goals applicable to their  
 4           respective positions.

5           Blodgett Decl. Exh. B.

6           Section 1.2 of the Comp Plan further describes the “Plan Objectives” as follows:

7           Recognize and reward Plan Participants for their efforts associated with the  
 8           production of the desired sales volume and margin.

9           Recognize and reward high-quality business transactions that enable  
 10          revenue recognition by having the desired standard payment terms.

11          *Id.*

12          When the contract is properly read as a whole, it becomes clear that the  
 13          agreement contemplates that XCare will exercise its discretion consistent with its  
 14          promise to provide sales representatives with an incentive compensation arrangement  
 15          that offers them an opportunity to earn unlimited commissions when the “meet and  
 16          exceed goals applicable to their respective positions.” Thus, it is a reasonable  
 17          expectation of an XCare employee under this plan that they will be rewarded “for their  
 18          efforts associated with the production of the desired sales volume and margin.”  
 19          Accordingly, the covenant of good faith and fair dealing places limits on XCare’s  
 20          exercise of discretion.

## 2.        **XCare Breached the Covenant**

21          The record shows that XCare acted in bad faith in terminating McCollum’s  
 22          employment. First, there is direct evidence that XCare was motivated by its desire to  
 23          ensure that the company retained the benefit of the commissions that were going to  
 24          McCollum. In his Friday, October 6 email, Pianko showed his true intent for terminating  
 25          McCollum: “cost cutting.” Lebowitz Decl. Exh E. He specifically commanded that  
 26          McCollum be terminated no later than close of business, Wednesday, October 11. *Id.*  
 27          He made that command because he was “shooting for a Thursday signing.” *Id.* Exh. K.  
 28          Thus, there is direct evidence that XCare was motivated by its desire to cheat McCollum  
 29          out of her commissions.

1           Second, XCare's allegation of poor performance by McCollum is nothing more  
 2 than a mere pretext for cheating her out of the commissions that she was about to attain  
 3 under the Technology Partnership Contract. The record shows that the allegation of  
 4 poor performance advanced by XCare is a fabrication, and done in bad faith.

5           In direct contradiction to XCare's interrogatory responses, Pianko testified that  
 6 Velasquez never complained about McCollum's performance. *Compare* Lebowitz Decl.  
 7 ¶ 11 & Exh. J with Pianko Depo 23:4-9, 182:7-11. The only relevant statement was  
 8 attributed to Amitaubh Dutt, the director of the LAPS division of NVG/FHS. However,  
 9 XCare deliberately misinterpreted Dutt's words and intent. Dutt merely stated that he  
 10 did not need to have any sales team members making contact with him; that he was  
 11 already sold on the project and only needed to maintain contact with the technical folks  
 12 at XCare. Dutt Depo 16:19-19:14. In other words, McCollum had successfully done  
 13 her job – he was sold. Dutt had absolutely no complaints about McCollum's  
 14 performance. *Id.* Dutt also had no intent, or authority, to speak on behalf of FHS as a  
 15 whole. *Id.*

16           Moreover, any contention that McCollum was not adequately performing her job  
 17 is ludicrous. Though McCollum was never given a performance review, the Comp Plan  
 18 provides an objective basis for assessing her performance. As part of her Comp Plan,  
 19 McCollum was assigned a quota of \$1.25 million for sixth months that remained in the  
 20 year 2000. Blodgett Decl. Exh. B at Attachment A.<sup>9</sup> As the Comp Plan states: "Sales  
 21 attainment of 70% of sales quota during the first full year on sales quota is considered  
 22 minimum acceptable performance. In subsequent years, attainment of 100% of quota is  
 23 minimum expected level of performance." *Id.* at § 1.7. Based on the contracts that  
 24 were signed between XCare and FHS in 2000, McCollum exceeded her full quota  
 25 number – not to mention her 70% expectation – by at least a multiple of five. Lebowitz

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26  
 27           <sup>9</sup>The quota is listed at \$2.5 million, but it is prorated to \$1.25 million to match her  
 28 start date of July 5, 2000. See Harrison Decl. Exh. A.

1 Decl. Exh J (Response to Interrogatory No. 6); Harrison Decl. ¶ 2 & Exh. A. Indeed, her  
 2 performance was so strong that she would have become eligible for the Presidents  
 3 Club. Blodgett Decl. Exh. B at § 3.4

4 In the end, “[w]hether [XCare] violated the implied covenant and breached the  
 5 contract . . . is a question for the trier of fact.” *Locke*, 57 Cal.App.4th 354.

6 **D. XCare Fails to Substantively Address McCollum’s Labor Code Claim**

7 In its motion, XCare baldly states that “[f]or all the above reasons”, McCollum  
 8 cannot state a claim under the California Labor Code. This statement is flawed. First,  
 9 this “mere assertion” cannot carry XCare’s burden on summary judgment. *Celotex*, 477  
 10 U.S. at 323; 11 *Moore’s Fed. Prac.*, at § 56.13[1]. Second, XCare fails to address the  
 11 various substantive provisions of the California Labor Code.

12 The California Labor Code defines “wages” to include commissions. Cal. Labor  
 13 Code § 200(a); see also *Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal.App.4th 1109,  
 14 1118; *First Nat'l Bank of Vista v. Hellen*, 392 F.2d 58, 59 (9<sup>th</sup> Cir. 1968). Moreover, at  
 15 the termination of an employee, all wages earned and unpaid become due and payable  
 16 immediately. *Id.* § 201. The employer has no more than 72 hours after the employee’s  
 17 discharge to make that payment. *Id.*<sup>10</sup> Willful failure to pay any such earned wages  
 18 subjects the employer to statutory penalties. *Id.* § 203. The Labor Code’s definition of  
 19 the term “willful” is *not* akin to the definition of that term when used generally to  
 20 determine liability for punitive damages. *Barnhill v. Robert Saunders & Co.*, 125  
 21 Cal.App.3d 1, 7-8 (1981) (“the employer’s refusal to pay need not be based on a  
 22 deliberate evil purpose to defraud workmen of wages. . .”) Instead, “willful” merely  
 23 means that the employer has intentionally (*i.e.*, not as a result of inadvertent oversight)

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<sup>10</sup>The same time period and employer obligations apply if the employee resigns. *Id.*

§ 202.

1 withheld wages after termination of an employee. *Id.*<sup>11</sup>

2 XCare argues that McCollum did not “earn” her commission because she was  
 3 not employed when the Technology Partnership Contract was signed. However, the  
 4 only reason McCollum was not employed at the time was because of XCare’s tortious  
 5 actions, aimed squarely at denying her the commissions that she had labored for. But  
 6 for XCare’s tortious actions, McCollum would have been employed at the time of  
 7 signing. See *California Division of Labor Standards Enforcement Policies and*  
 8 *Interpretations Manual*, § 17.6 (Oct. 1998) (“Exceptions abound where the termination is  
 9 not a quit but a discharge. In that case, *the employee has been prevented from*  
 10 *completing the duties* and may be able to recover all or a prorata share of the  
 11 commissions. (O.L. 1993.03.08)” (emphasis added).).<sup>12</sup> Accordingly, McCollum has  
 12 raised a triable issue as to her Labor Code claim.

13       **E. XCare’s Refusal to Pay McCollum Her Commission on the**  
 14 **Technology Partnership Contract Constitutes an Unfair Business**  
 15 **Practice That Should Result in the Disgorgement of the Commission**  
 16 **Proceeds Retained by XCare**

17       California’s Unfair Competition Law (“UCL”) prohibits businesses from engaging  
 18 in “any unlawful, unfair or fraudulent business act or practice. . .” Cal. Bus. & Prof.  
 19 Code § 17200. The scope of this prohibition is intentionally broad. *Cel-Tech*  
 20 *Communic., Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal.4th 163, 180 (1999). Indeed, it  
 21 is “sweeping, embracing anything that can properly be called a business practice and  
 22 that at the same time is forbidden by law.” *Id.* (citations and quotation marks omitted).  
 23 UCL violations are found in two ways: (1) by “borrowing” violations of other statutes, or

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24       <sup>11</sup>Notably, there is no “good faith” defense. If the trier of fact believes that there is  
 25 substantial evidence to support McCollum’s position, then XCare will be liable for the  
 26 penalty provisions of section 203. *Id.* (citing *Davis v. Morris*, 37 Cal.App.2d 269, 274  
 27 (1940).)

28       <sup>12</sup>For the convenience of the Court, this provision of the DLSE manual is attached  
 29 to the Lebowitz Declaration at Exhibit L.

1 (2) by finding that a particular business practice is “deemed unfair even if not specifically  
 2 proscribed by some other law.” *Id.* at 180 (citations omitted).

3           **1. Because XCare’s Actions Violate the California Labor Code,  
                 They Also Violate the UCL**

5           It is well-settled California law that failure to comply the California Labor Code’s  
 6 wage provisions also provide a basis for a violation of the UCL. *Cortez v. Purolater*  
 7 *Airfiltration Prod. Co.*, 23 Cal.4th 163, 168 (2000); *Hudgins v. Neiman Marcus Grp., Inc.*,  
 8 34 Cal.App.4th 1109, 1126-27 (1995). As set forth above, McCollum has raised a  
 9 triable issue as to her claim for violation of the California Labor Code. See, *supra*, §  
 10 V.D. Borrowing from that claim, she has raised a triable issue as to her UCL claim.

11           **2. XCare’s Forfeiture Practice is also “Unfair” and Therefore  
                 Violates the UCL**

13           The UCL “makes clear that a practice may be deemed unfair even if not  
 14 specifically proscribed by some other law.” *Cel-Tech*, 20 Cal.4th at 180. As the  
 15 California Supreme Court acknowledged, “[T]he Legislature . . . intended by this  
 16 sweeping language to permit tribunals to enjoin ongoing wrongful business conduct in  
 17 whatever context such activity might occur.” *Id.* (citation omitted). Thus, the Supreme  
 18 Court held, the UCL’s definition of “unfair” is flexible and dependent upon the particular  
 19 allegations of a claim. *Cel-Tech*, 20 Cal.4th at 186-87 & n.12 (defining “unfair” in  
 20 context of facts of that case, but specifically limiting its holding to those facts.). Since  
 21 *Cel-Tech*, no California published decision has addressed the definition of “unfair” in the  
 22 current context. However, this Court is guided by the fact that the UCL is a law drawing  
 23 on the court’s powers sitting in equity. *Id.* at 180-81; see also Cal. Bus. & Prof. Code §  
 24 17203 (providing only equitable remedies for violations). Thus, this Court can draw on  
 25 its equitable powers in this case to find that XCare’s conduct – retaining the substantial  
 26 monetary benefit that was earned by McCollum’s tirelessly working on the FHS account  
 27 – is unfair under the UCL.

28           XCare’s Comp Plan calls for forfeiture of wages earned by an employee should

1 that employee resign their employment or be terminated. Blodgett Decl. Exh. B, §§ 1.5  
 2 (“otherwise deferred commission payments that have not been distributed to Plan  
 3 provisions will be forfeited.”), 4.5 (“Any deferred commissions or bonuses not paid as of  
 4 the employee’s date of termination, are forfeited, regardless of the years commissions  
 5 were earned.”). Indeed, in its motion, XCare emphasizes this point. *Def.’s Mem P&A* at  
 6 9:12-10:11, 11:14-12:4. There should be no doubt but that this forfeiture provision is  
 7 entirely “unfair” in the present situation.

8       One of XCare’s motivating factors in hiring McCollum was to work on the FHS  
 9 account. McCollum Depo 99:21-100:21. As soon as she started with XCare, she  
 10 began working tirelessly to reap the most possible revenue out of the account.  
 11 McCollum Decl. ¶ 8. To that end, she drafted the first version of the Technology  
 12 Partnership Contract. Cangarlu Depo 40:20-42:7; McCollum Decl. ¶ 6. Then,  
 13 McCollum spent the majority of her employment with XCare tending to the multi-headed  
 14 beast that the contract became. See *supra* § III.A.1. With all the various working parts  
 15 and personalities involved, it was a very unruly process. Nevertheless, McCollum  
 16 coordinated (“drove”) the contract negotiations to her very last day. Ultimately, it was not  
 17 her fault that the contract was not signed on September 22 (the record shows that  
 18 everyone at XCare expected it to happen then), rather it was FHS’ Velasquez’ last  
 19 minute change of heart that caused the delay. Despite these herculean efforts, XCare  
 20 conspired to ensure that it did not have to pay out any commissions to McCollum, and  
 21 sought to enforce the Comp Plan’s forfeiture provisions to retain the benefit of what it  
 22 believed to be in excess of \$570,000. See *supra* § III.A.3-4. This complete forfeiture  
 23 provision does not provide for any allocation for work done or efforts put forth in  
 24 attaining a signed contract.

25       A claim under the UCL looks squarely to the court’s equitable powers whereby  
 26 the plaintiff may recover ownership of ill-gotten gains. *Cortez*, 23 Cal.4th at 173; see  
 27 also Cal. Bus. & Prof. Code § 17203. In this case, XCare used the Comp Plan’s  
 28

1 forfeiture clause to retain the entirety of McCollum's commissions. A trier of fact could  
 2 easily find that such a practice is unfair under the UCL, thus, summary judgment is not  
 3 appropriate.

4           **F. McCollum's Public Policy Claim Falls Squarely Within California Law**

5           “Of course, a tort cause of action for wrongful termination in violation of public  
 6 policy is now well established in California.” *Pettus v. Cole*, 49 Cal.App.4th 402, 453  
 7 (collecting cases). Moreover, “the prompt payment of wages due an employee is a  
 8 fundamental public policy of this state.” *Gould v. Maryland Sound Indus., Inc.*, 31  
 9 Cal.App.4th 1137, 1147 (1995). An action for wrongful termination in violation of public  
 10 policy “will lie ‘wherever the basis of the discharge contravenes a fundamental public  
 11 policy.’” *Id.* (quoting *Soules v. Cadam, Inc.*, 2 Cal.App.4th 390, 401 (1991).) “The tort of  
 12 wrongful discharge is committed if the employee is terminated for ‘a purpose that  
 13 contravenes fundamental public policy.’” *Id.* at 1148 n.3 (quoting *Gantt v. Sentry Insur.*,  
 14 1 Cal.4th 1083, 1094 (1992) (emphasis in original).)

15           The record in this case shows that XCare's purpose in terminating McCollum was  
 16 to avoid paying her commissions on the Technology Partnership Contract. See *supra* §  
 17 III.A.3-III.B. McCollum's termination came out of the blue; she had been given no  
 18 indication whatsoever that she was going to be terminated. When the signing date for  
 19 the Technology Partnership Contract was delayed, XCare acted quickly. On Friday,  
 20 October 6, Pianko announced to senior management that McCollum was to be  
 21 terminated – for “cost cutting” reasons – no later than Wednesday, October 11. At the  
 22 same time, Pianko was “shooting for a Thursday signing” of the Technology Partnership  
 23 Contract. Thus, the record shows that “a purpose” of XCare's actions was to cheat  
 24 McCollum out of her commissions. See also *supra* § V.C.2.

25           XCare's attempt to distinguish *Gould* is meritless. Specifically, XCare places  
 26 great weight on the fact that the plaintiff in *Gould* had “earned” the disputed  
 27 commissions, while McCollum allegedly has not actually “earned” her commissions.  
 28

1 There are several things wrong with this attempted distinction. First, as stated above in  
 2 regard to the breach of contract claim, it is not at all clear from the contract what it  
 3 means to "earn" commissions. Second, even if XCare's reading is followed, an  
 4 employer cannot benefit from taking specific actions to prevent an employee from  
 5 earning commissions if its motivation was to retain the benefit of that money.

6 Accordingly, McCollum has raised a triable issue as to her public policy claim.

7 **G. McCollum Has Raised a Trible Issue as to Her Declaratory Relief  
8 Claim**

9 The California Code of Civil Procedure provides that a party to a written contract  
 10 may bring a cause of action seeking a judicial determination of the rights of the  
 11 respective contracting parties. Cal. Code Civ. Proc. § 1060. This remedy is cumulative  
 12 to all other causes of action, even though the other claims may deal with the same  
 13 contract. *Id.* § 1062; see also *Southern Cal. Edison, Co. v. Superior Court*, 37  
 14 Cal.App.4th 839, 847 (1995).

15 For all the reasons set forth in regard to McCollum's claim for breach of contract,  
 16 (*supra* § V.B.) the record shows a triable issue as to her declaratory relief claim.

17 **VI. CONCLUSION**

18 XCare has submitted no admissible evidence to support its version of events or  
 19 its purportedly undisputed facts. Despite XCare's attempts to misconstrue and  
 20 mischaracterize McCollum's claims, the record shows triable issues of fact as to each of  
 21 McCollum's causes of action.

22 Dated: March 29, 2002

23 McGUINN, HILLSMAN & PALEFSKY  
24 Attorneys for Plaintiff Anne McCollum

25 /s/  
26 NOAH D. LEBOWITZ